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IN THE
Supreme Court of the United States
October Term, 1971

No. 70-295

FIRST NATIONAL CITY BANK,

Petitioner,

against

BANCO NACIONAL DE CUBA,

Respondent.

**BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

VICTOR RABINOWITZ

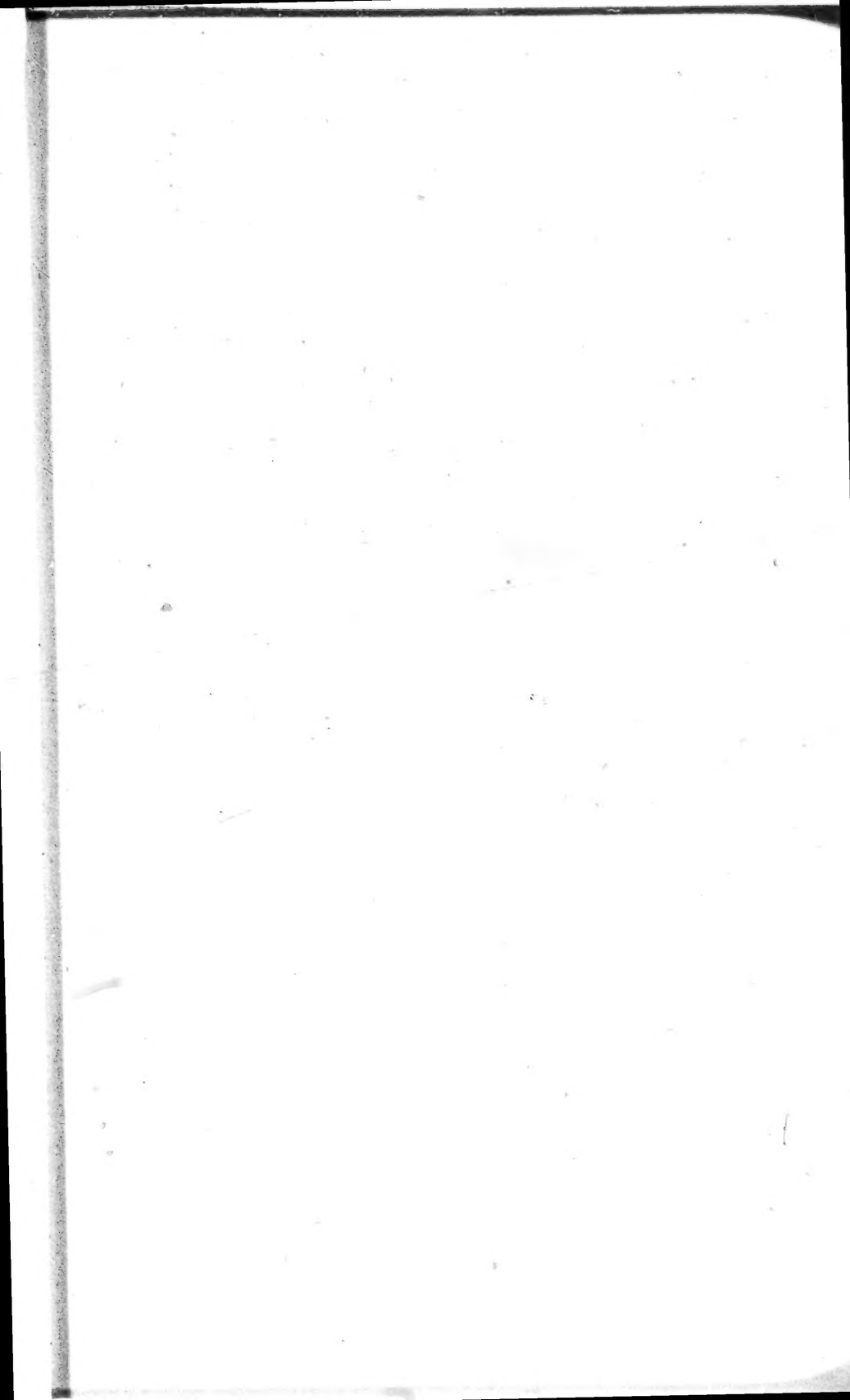
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**BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI
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Questions Presented for Review

1. Is this Court bound by the suggestion of the State Department that henceforth there shall be an exception to the act of state doctrine, as enunciated most recently in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, to wit, that such doctrine need not be applied when it is raised to bar adjudication of a counterclaim when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred, (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim, and (c) the foreign policy interests of the United States do not require application of the doctrine; and by the further suggestion that this is a case in which such exception should apply?

2. Does the Hickenlooper amendment, 22 U.S.C. § 2370 (e)(2), enacted to permit a court, notwithstanding the act

of state doctrine, to pass upon the validity of title to property expropriated by a foreign government when such property is marketed in the United States, likewise applicable to a counterclaim seeking compensation for the value of realty and intangible personality nationalized by the government of Cuba within its territory?

3. Is the act of state doctrine inapplicable to a counterclaim?

4. If the act of state doctrine applies, does petitioner nevertheless have a cause of action for damages against respondent arising from the nationalization of its property?

If any of the foregoing questions is answered in the affirmative, one or more of the following issues are presented, all raised in the Court of Appeals but not reached:

5. Is respondent, a wholly owned, autonomous, instrumentality of the Government of Cuba, with a capital and identity of its own, responsible for the debts of that Government?

6. In an action brought by respondent against petitioner, is the Government of Cuba an "opposing party" within Rule 13 of the Federal Rules of Civil Procedure so as to permit petitioner to interpose a counterclaim against it?

7. Is the Hickenlooper amendment unconstitutional, in that (a) it is an impermissible interference with the Judicial Branch of the government, in that it directs a court to decide a question which this Court has already found to be nonjusticiable and (b) it is here being applied retroactively to a cause of action arising out of transactions completed prior to its enactment?

8. Assuming that, for any reason, the act of state doctrine is not a defense to the petitioner's counterclaim so that the Court must pass upon this case "on the merits", did the Republic of Cuba violate international law when it nationalized the property of petitioner?

Statement of the Case

In 1958, petitioner made a \$15,000,000 secured loan to a corporate instrumentality of the Republic of Cuba, which deposited with petitioner collateral consisting of bonds of the United States Government and obligations of the International Bank of Reconstruction and Development. The present government of Cuba came into power on January 1, 1959, and shortly thereafter respondent succeeded to all of the interests of the borrower of the funds. In July, 1960, \$5,000,000 of the loan was paid and petitioner released approximately one-third of the collateral (J.A. 11, 12).

On September 17, 1960, the Government of Cuba nationalized the branch offices of the petitioner in Cuba. Petitioner retaliated almost immediately. On September 20, 1960, it notified respondent that it had closed respondent's accounts as of September 17, 1960, and that it was claiming the amounts deposited therein as an offset against the nationalization of its properties in Cuba. Furthermore, on September 21 and 22, 1960, petitioner sold the collateral held by it as security on the \$10,000,000 loan, which was still unpaid. Petitioner received from that sale an amount—conceded to be at least \$11,892,448 and perhaps as much as \$12,412,000—which was substantially in excess of that required to discharge the \$10,000,000 principal sum and the interest thereon. It is this excess which is in dispute in this action (J.A. 12, 13, 29, 49-51).

Respondent instituted suit in November, 1960, to recover the excess (J.A. 11-13).¹ The petitioner's answer was long and complex (J.A. 15-28). Eliminating irrelevancies, we think it fair to state that it contains general denials as

¹ The complaint alleges two causes of action, of which only the first is involved in this proceeding. The second was decided adversely to respondent by the District Court and was abandoned on appeal.

to the cause of action pleaded by the respondent and then alleges that respondent is an instrumentality of and "indistinguishable from" the Government of Cuba; that on September 16 and 17, 1960, the Republic of Cuba nationalized the property of the petitioner in the territory of Cuba and seized all of the petitioner's property and that the reasonable value of the property seized was substantially in excess of the amount claimed in the complaint. A "defense, setoff and counterclaim" is pleaded in several alternative forms: (a) that the Republic of Cuba, alleged to be the real party in interest, comes into court with unclean hands (J.A. 22, 23); (b) that petitioner has been damaged by the wrongful and tortious acts of the Republic of Cuba, for which it is entitled to recover damages (J.A. 23) and (c) that the Republic of Cuba is obligated by international law to pay prompt, adequate and effective compensation to petitioner (J.A. 23, 24).

The amended reply denies the relevant allegations of the counterclaim and alleges, as an affirmative defense, that respondent was not responsible for the obligations of the Republic of Cuba (J.A. 29-33).

In May 1961 the petitioner moved for summary judgment, relying on the District Court decision in *Banco Nacional v. Sabbatino*, 193 F. Supp. 375. No decision was made on that motion at that time and after the decision of this Court in *Sabbatino*, at 376 U.S. 398, respondent cross-moved for summary judgment. On July 21, 1967, after passage of the Hickenlooper amendment, 22 U.S.C. § 2370(e)(2), the District Court decided both motions, upholding the counterclaim for "any amounts due and owing to [petitioner] from the Cuban Government by reason of the confiscation of First National City's Cuban property". It denied petitioner's motion for summary judgment but only because there was a triable issue of fact as to the value of those properties (J.A. 34-47).

To secure a decision on the law without the necessity of a long and complicated trial on a factual issue of second-

dary importance, the parties entered into a stipulation for purposes of this case only, in which it was agreed that if petitioner is lawfully entitled to the offset claimed by it, the amount thereof is such that respondent would take nothing in this action and final judgment was entered.

Respondent appealed and the Court of Appeals unanimously reversed holding that the Hickenlooper amendment did not apply and that this Court's opinion in *Sabbatino* did (J.A. 48-70).

On petition to this Court for a writ of certiorari, the Solicitor General filed a memorandum transmitting a letter from the State Department expressing the view that the act of state doctrine should not be applied to bar consideration of counterclaims in the circumstances of this case. This Court granted the writ, vacated the judgment of the Court of Appeals and remanded the case for reconsideration "in the light of the views of the Department of State," while expressly refraining from indicating any views on the merits (J.A. 71). On remand the same panel of the Court of Appeal adhered to its original decision, this time with one judge dissenting (J.A. 72-87).

Summary of Argument

The act of state doctrine, as formulated by this Court in *Sabbatino* and other cases, is a complete defense to the petitioner's counterclaim, and judgment should have been entered on that counterclaim in favor of respondent.

It is argued, however, that there are three applicable exceptions to the act of state doctrine. The first, urged by both the Solicitor General and the respondent, is founded on *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 210 F. 2d 375 (2d Cir. 1954) and is premised on the assumption that the act of state doctrine is to be applied or withheld in the discretion of the Executive Branch of the

Government. On that assumption the Solicitor General here directs the Court not to apply the act of state doctrine. Respondent believes the premise to be invalid as constituting a serious invasion of the independence of the Judiciary with the undesirable consequence that it would make this Court the instrument of the foreign policy of the Executive Branch, and subject to the inevitable and frequent changes in such policy.

The second claimed exception to the act of state doctrine, urged by petitioner, is that the Hickenlooper amendment applies. But it is clear from both its language and its legislative history, that the amendment does not apply to this kind of case. If it is applicable, by its terms it is unconstitutional, first, because it violates the separation of powers clause of the Constitution and, second, because it is here being applied retroactively.

The third claimed exception to the act of state doctrine is petitioner's contention that it does not apply to counterclaims. There is no authority for the position, and it is totally inconsistent with the reasoning of this Court in *Sabbatino*.

Petitioner further argues that even if the act of state doctrine is applicable to this case, the Cuban Government is nevertheless indebted to it for the value of the property confiscated. No authority is cited for this proposition either and respondent submits that it too, is fundamentally inconsistent with the holding of this Court in *Sabbatino*. Even if such a claim did exist, it would be governed by Cuban law, not United States law, and there is no suggestion by petitioner that under Cuban law it is entitled to the recovery it seeks.

There is furthermore a basic flaw in the petitioner's case in that on this record there is no justification for summary judgment in its favor on the counterclaim, quite regardless of any defense thereto. That counterclaim is

based on the argument that the Republic of Cuba and the respondent are the same, but that is not true either as a matter of fact or as a matter of law. Furthermore, even if Banco Nacional were to be held responsible for the debts of the Government of Cuba, the counterclaim would still be improper under Rule 13 of the Federal Rules of Civil Procedure in that the counterclaim is not a claim by "an opposing party" within that rule.

Finally, if the Court should dispose of all other issues in favor of petitioner, it would be confronted with perhaps the most difficult of all issues, namely, whether the action of the Republic of Cuba in nationalizing the property of the petitioner was in violation of international law. Respondent urges that it was not. International law cannot be anything other than the practice of nations and there is no recognizable practice which would prohibit the kind of nationalization which occurred here.

ARGUMENT

POINT I

The decision in the *Sabbatino* case requires judgment in favor of the respondent.

Judgment in favor of respondent is required by the decision of this Court in *Sabbatino*, *supra*:

"... the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." (p. 428)

See also *Underhill v. Hernandez*, 168 U.S. 250; *American Banana Co. v. United Fruit Co.*, 213 U.S. 347; *Oetjen*

v. *Central Leather Co.*, 246 U.S. 297; *Ricaud v American Metal Co.*, 246 U.S. 304; *United States v. Belmont*, 301 U.S. 324; *United States v. Pink*, 315 U.S. 203.

The Executive Branch and the petitioner have argued that one or another alleged exceptions to the act of state doctrine applies and this brief will be in large part devoted to a discussion of those contentions.²

POINT II

There are no exceptions to the act of state doctrine applicable to this case.

A. The act of state doctrine is not a rule of law to be applied or withheld at the bidding of the Executive Branch, and it should be applied in this case, notwithstanding the suggestion of the State Department to the contrary.

Under date of November 17, 1970, the Legal Adviser to the State Department wrote to this Court suggesting that the act of state doctrine, as expounded by this Court

² The position of the Executive Branch and of the petitioner as well is based on the assumption that the counterclaim is a valid claim, supported by the record and that the only issue is the sufficiency of the respondent's defense thereto. But this is not so; there is no record to support a judgment on the counterclaim in any event. See Points V and VI, *infra*, pp. 32-38. Logically that should therefore be the first issue to be considered by this Court, since if respondent is right there is no occasion to consider any of the different issues arising out of the act of state doctrine and the alleged exceptions thereto. We have not been logical, however, in the writing of this brief because the Court of Appeals considered the issues in such sequence that it never reached the question of the validity of the counterclaim, although it did agree that respondent's argument as to its invalidity was made "with some justification" (J.A. 54). For that reason and because this Court remanded for further consideration of the issues arising out of the application of the act of state doctrine, we have given first attention to those issues. In fact, however, none of them need be reached.

in *Banco Nacional v. Sabbatino*, *supra* "need not be applied when it is raised to bar adjudication of a counterclaim or set-off when . . . the foreign policy interests of the United States do not require application of the doctrine". The letter goes on to say that in the instant case the foreign policy interests of the United States do not require "application of the act of state doctrine to bar adjudication of the validity" of the petitioner's counterclaim (Letter, John R. Stevenson to E. Robert Seaver, Clerk of the Court, pp. 6, 7). In a brief *amicus curiae*, subsequently filed by the Solicitor General in support of the petition for a writ of certiorari dated July, 1971, the Executive Branch goes further, alleging that in "the present class of cases" (i.e., counterclaims), the act of state doctrine "should not be applicable" (Amicus brief on petition, pp. 2 and 3). Petitioner argues that this position of the Executive Branch requires a reversal of the Court of Appeals' order.

A brief review of the various positions taken by the Executive Branch with respect to Cuban litigation may be helpful. The first relevant case was *Pons v. Republic of Cuba*, 294 F. 2d 925 (D.C. Cir. 1961), *cert. den.* 368 U.S. 960. There Cuba sued to recover money belonging to it in the possession of the defendant. The defendant counterclaimed for the value of his property which, he alleged, had been confiscated by the Cuban Government. The Court of Appeals invited the Executive Branch to file briefs, but no briefs were filed, and the court held the act of state doctrine applicable to the counterclaim, and ordered that it be dismissed. Certiorari was denied, 368 U.S. 960.

The next case was *Rich v. Naviera Vacuba*, 197 F. Supp. 710 (E.D. Va. 1961) *aff'd* 295 F.2d 24 (4th Cir. 1961). In an application for a stay pending a petition for certiorari, one of the libellants, United Fruit Company, raised issues concerning title to property nationalized by

the Cuban Government, on facts which were, in relevant respects, identical with those in *Sabbatino*. The Justice Department responded with a brief opposing the claim, saying:

"Petitioner, in effect, seeks redress in this proceeding for the expropriation of its property allegedly owned by it in Cuba. But no such redress is available here. It may be assumed that the confiscation is unlawful under international law, i.e., so far as relations between the Governments of the United States and Cuba are concerned. But that does not mean that Cuba, as between itself and petitioner, does not have valid title to the expropriated property so far as our courts are concerned."

The Solicitor General then discussed the standard act-of-state cases and went on to say:

"This act-of-state doctrine prevents any inquiry by our courts into the acts of the Cuban Government in Cuba which, in this case, may have resulted in the expropriation or confiscation of sugar or other property owned by petitioner in Cuba. And assertion that its property was seized without legal justification and without due process of law in violation of the Fifth Amendment is of no aid to petitioner. *United States v. Pink*, 315 U.S. 203, 228."

The memorandum then discussed and quoted from *Pons v. Republic of Cuba*, *supra*, and then concluded:

"This doctrine applies with full force to preclude judicial review, in domestic courts, even where the act of the foreign state is asserted, as here, to be in conflict with or in violation of international law."³

³ The original of this memorandum will be found in the files of this Court, and was reprinted in full in 1 Amer. Soc. Int'l Legal Materials, 276, 302-305 (1962).

The stay was denied on September 14, 1961, on authority of *Underhill v. Hernandez*, 168 U.S. 250 and *Ricaud v. American Metal Co.*, 246 U.S. 304.⁴

When the *Sabbatino* case reached this Court, the Court again invited the Executive Branch to file an amicus brief. It did so⁵ and, in fact, argued orally in support of the act of state doctrine. After the *Sabbatino* case was decided, Senator Hickenlooper proposed an amendment to the then pending Foreign Aid Act, and in the hearings held on that Act the Executive Branch once again warmly supported the act of state doctrine and opposed the amendment.⁶

In the instant case, the Executive Branch has completely reversed its position. Although it purports to limit its present stand to cases involving counterclaims, the reasons urged are applicable to any kind of claim, and it is irrational to make the applicability *vel non* of the act of state doctrine depend on accidents of pleading.

The full implications of the present position of the Executive Branch are indeed grave. Although it now says that its policy with respect to foreign expropriations re-

⁴ One highly relevant fact does not appear in the opinions: on August 16, 1961, the day before the *Bahia di Nipe* sailed into United States waters, the Cuban Government had returned to the United States an Eastern Air Lines plane which had been hijacked three weeks prior (New York Times, August 17, 1961, p. 8, col. 6).

From the political point of view, the United States could hardly refuse to return the freighter and its cargo, in view of the fact that Cuba had just returned an airplane which had come into Cuban territory under comparable conditions. The incident affords an excellent illustration of public policy considerations which motivate governments in this area of activity and of the reasons the courts should refrain from involvement.

⁵ That brief will be referred to hereinafter as the *Sabbatino* Amicus Brief.

⁶ See, *infra*, footnote 8.

quires only a refusal to accept the act of state doctrine, the fact is that the purpose of the administration, namely "to protect United States investment abroad" (Amicus Brief on petition, p. 2), can be met only by an ultimate adjudication on the merits in favor of the petitioner. Thus, the Executive is now demanding not only that the Court abandon the act of state doctrine; but also, if the needs set forth in the amicus brief are to be served by the Judiciary, a ruling on the merits in favor of the petitioner for policy, not legal reasons. Abandonment of the act of state doctrine may thus place this Court in the very dilemma it sought to avoid in *Sabbatino*: it may have to choose between, on the one hand, a decision in favor of petitioner, notwithstanding the law, in order "to protect United States investments abroad" or on the other, a decision against petitioner on the law, thus defeating an important position of the Executive Branch on the subject of expropriations—a foreign policy position which extends far beyond the present controversy. This possibility is a very real one, since the question of law in this case is one that is by no means free from doubt, as this Court pointed out in *Sabbatino*, pp. 428, 429. And see Point VII, *infra*, pp. 38 *et seq.*

This is precisely what the Attorney General warned against in the *Sabbatino* Amicus Brief (p. 46) when he said that the rule now proposed by the Executive Branch "offers too much likelihood of embarrassment simply because of a miscalculation of the likely ruling of the judicial forum upon a question of international law."

Petitioner and the Executive Branch rely principally on *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 210 F. 2d 375 (2d Cir. 1954). We think them in error.

The *Bernstein* case arose out of an unusual set of facts. See *Bernstein v. Van Heyghen Freres S.A.*, 163 F. 2d 246 (2d Cir. 1947), *cert. den.* 332 U.S. 772; *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 173 F. 2d 71 (2d Cir.

1949) and *Bernstein v. N.V. Nederlandsche Amerikaansche, etc., supra*. We respectfully submit it was one of those hard cases that made doubtful law. It was characterized by the Justice Department in 1963 as "an exceedingly narrow" exception to the act of state doctrine (*Sabbatino* Amicus Brief p. 37). The "Bernstein" exception has been applied only once in the history of the United States, in the *Bernstein* case itself, and was not considered by this Court even on that single occasion. The Court of Appeals has cogently distinguished the *Bernstein* case (J.A. 79-81), as, indeed, did the Executive Branch in the *Sabbatino* Amicus brief (pp. 34-38), and we shall not repeat those distinctions here.

The proposal now made by Mr. Stevenson was first made, in slightly different form, by the Committee on International Law of the Association of the Bar of the City of New York in 1959, in a report entitled *A Reconsideration of the Act of State Doctrine in the United States Courts*.⁷ It was there proposed that the act of state doctrine should be limited to those cases in which the Executive Branch expressly stipulates that it does not wish the court to pass upon the question of the validity of the act of a foreign sovereign. This proposal was discussed by this Court in *Sabbatino* on page 436, and was rejected for the reasons set forth in the Court's opinion. Those reasons were discussed at somewhat greater length in the *Sabbatino* Amicus Brief, at page 44:

"Such a rule would . . . put an embarrassing burden upon the Executive. In the conduct of inter-

⁷ The present Legal Advisor to the State Department was then Chairman of the International Law Committee of the Bar Association. The same views were expressed by him in 1963 in 57 *Amer. J. of Int. Law* 97, entitled *The Sabbatino Case—Three Steps Forward and Two Steps Back*, a commentary on the Court of Appeals decision in the *Sabbatino* case. Mr. Stevenson was then a member of the Board of Editors of the *American Journal of International Law*. The view was again put forward before this Court in the *Sabbatino* case itself.

national relations, it may be of the utmost importance to preserve silence or at least to refrain from issuing official documents upon the legal status of the act of a foreign government. The proposed rule would compel the Executive either to issue a formal statement in advance of litigation whenever a foreign government had issued a decree that someone might claim affected the title to property within its jurisdiction in violation of international law, or else to keep track of court dockets all over the country lest a case that would embarrass the conduct of foreign relations go to judgment without the Executive's raising the bar. Even if this burden were eased by requiring notice to the Executive before the presumption of executive consent would be invoked, the Executive would still face the embarrassment of taking a position when silence would be wiser, or of announcing its position at a moment highly inopportune from the diplomatic standpoint in order to suit the convenience of private litigation."⁸

The Executive Branch has been far from consistent in its approach to the act of state doctrine. The facts in the *Pons* case were the same as in the present case save that the party in office has changed. It is not unusual that different administrations should have different views on policy, but it is quite another thing to require the Judiciary to follow every such change in policy, especially since some of them may be quite unexpected. The result would be to turn the Court into an instrument of the foreign, or perhaps even the domestic, policies of the current Administration. This is contrary to the principle of the separation of powers and

⁸ The same point was also made by the Executive Branch in its testimony before Congress when it was considering the Hickenlooper Amendment. See Hearings before Committee on Foreign Relations, United States Senate, 88th Cong., 2d Sess. on S. 2659, 2660, 2662 and H.R. 11380, pp. 618, 619; Hearings Before the Committee on Foreign Affairs, House of Representatives, 89th Cong., 1st Sess., on H.R. 7750, p. 1234.

inconsistent with the integrity of the Judicial Branch, which cannot and should not be placed in a position where its decisions on important questions of international law vary from time to time as one administration succeeds another.

B. The Hickenlooper amendment is not applicable to this action.

As has been pointed out by others (see, e.g., *French v. Banco Nacional*, 23 N.Y. 2d 46, 80 (1968); Henkin, *Act of State Today; Recollection in Tranquility*, 6 Col. J. Transnational Law 175, 180, 1967), the Hickenlooper amendment falls far short of being a model of legislative clarity. Some aid in understanding and applying the legislation may be derived by a consideration of its legislative history.

The Hickenlooper amendment was prompted by this Court's decision in the *Sabbatino* case on March 23, 1964.

Its text appears at p. 2a of petitioner's brief. That text raises the problem of what is meant by "a case in which a claim of title or other right to property is asserted by any party . . . based upon . . . the confiscation or other taking . . .".

As we note below, Point III, until quite recently the petitioner evidently conceded that the Hickenlooper amendment did not apply to this litigation. The District Court nevertheless held that the *Sabbatino* case would have been applicable, but that it was overruled by the Hickenlooper amendment (J.A. 39-40). In its opinion it assumed, without discussion, that this was a "case" coming within the language of the amendment.

Respondent urges that the applicability of the Hickenlooper amendment is substantially limited to the factual situation presented in *Sabbatino*, i.e., to cases in which a foreign government in litigation in a United States court asserts title to marketable personal property (or the pro-

ceeds of its sale) which is sought to be disposed of in the world market. If the language is so read it does not apply at all to this situation, in which (1) the property of the petitioner which was seized in Cuba is not personal property, was not marketable and never came into the United States; and (2) the claim asserted by petitioner is not a claim "asserted by any party . . . based upon . . . a confiscation"; rather it is a claim asserted in derogation of the Cuban nationalization decree.

The language of the statute cannot reasonably be extended to cover this case. *French v. Banco Nacional*, 23 N.Y. 2d 46 (1968). This is so because Congress did not intend to legislate with respect to these facts—indeed, the legislative history specifically negatives any such intent.

The amendment⁹ as originally proposed by Senator Hickenlooper in the Foreign Relations Committee in April, 1964 read as follows:

"No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits, or to apply principles of international law including the principles of compensation and the other standards set out in this subsection, in a case in which an act of a foreign state occurring after January 1, 1959 is alleged to be contrary to international law, and effect shall not be given by the court in any such case to acts that are found to be in violation thereof." (S. Rep. No. 1188, Part I, 88th Cong., 2d Sess. [1964], p. 37; emphasis added.)

Had this language been retained, the statute would clearly cover the situation presented by this record; how-

⁹ Throughout the legislative history of the amendment in both 1964 and 1965 it is referred to, not as the Hickenlooper amendment, but as the Sabbatino Amendment. (Senate Hearings, *supra*; Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. [1965], *passim*.)

ever, it was *not* retained and the Conference Committee, in September 1964, rewrote the language substantially, inserting, *inter alia*, the reference to a "claim of title or other right" which now appears in the statute. The words "to property" were added in 1965.

Examination of the debates in Congress and testimony before the several Congressional Committees considering the amendment in 1964, and again in 1965, demonstrates that the Congress was concerned only with the *Sabbatino* problem, namely, an attempt by an expropriating state to dispose of compensable, marketable personal property, usually industrial products, by asserting title hereto based on the expropriation.

For example, on August 14, 1964, Senator Hickenlooper, in a letter to the Washington Post, inserted in the Congressional Record, answered an editorial in opposition to his amendment, and explained that the purpose of his proposal was to require American courts to apply international law "whenever expropriated property comes within the territorial jurisdiction of the United States" (110 Cong. Rec. 19548). He expressed his concern that unless the *Sabbatino* decision was overruled "the result will be that property expropriated in violation of international law can be marketed throughout the world without hindrance by the judicial processes of national courts all over the globe. Certainly the United States should not become an international 'thieves market' ". (110 Cong. Rec. 19548.)

It would be wearisome to call attention to the scores of additional instances in the legislative history of the amendment in which this thesis was repeated by both proponents and opponents of the bill. See, for example, 110 Cong. Rec. 19548, 19555, 19557, 19559. When the Conference Committee reported to the House of Representatives on October 2,

1964, Congressman Adair, who sponsored the legislation in the lower chamber, explained the amendment by saying

“It insures that, however the case may arise or the act of state doctrine be invoked, a party who had suffered an expropriation in violation of these principles [of international law] may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States or can resist a suit by the expropriating government to seize the property.” (110 Cong. Rec. 23680)

Senator Hickenlooper on the next day repeated virtually the same language to the Senate. (110 Cong. Rec. 24076-77.)

The Hickenlooper amendment in its original form was limited to one year and when it came up again in 1965 the tenor of the discussion was exactly the same. Extended hearings were held before the House Committee on Foreign Affairs. The first witness was Professor Cecil Olmstead representing the Rule of Law Committee, one of the original authors of the amendment. Throughout his testimony, as well as that of other interested witnesses, concern was expressed that the *Sabbatino* decision would make it impossible for United States owners of expropriated property to attach their former property if it later came within the jurisdiction of American courts, and it was predicted that courts of other countries would follow the rule of our Supreme Court with respect to property brought within their jurisdictions. (House Comm. Hearings, *supra*, pp. 579, 591, 592, 599, 601, 605, 612, 613, 614, 615.)

Professor Olmstead explained not only what the Hickenlooper amendment was intended to do but also what it was *not* intended to do. Indeed, Mr. Fraser, a member of the Foreign Affairs Committee, was much concerned over the applicability of the amendment to the very situation presented in this case. His colloquy with Professor Olmstead

is most illuminating on this issue. (House Hearings, *supra*, p. 608):

"Mr. Fraser. . . .

One of the questions that I have about this amendment is to determine how broad it is. I think particularly of the phrase here where you speak of a claim or other right asserted. For example, supposing that country X expropriates some property and doesn't compensate for it and then a property belonging to the foreign state comes into the hands of an American citizen within this country so that they bring an action, they attach the property and bring an action in the U.S. courts alleging that this government has wronged them by expropriating their property, but the property they have attached is not the property that was expropriated, nevertheless they make the claim they are entitled to compensation and the defense, I assume, by the country involved is that they had a right to expropriate.

Does that situation come within the language of your amendment?

Mr. Olmstead. No sir; that would not come within it. Our amendment has no provision in its scope to apply to property other than that actually expropriated by the foreign country itself.

Mr. Fraser. It seems to me in this kind of litigation that I am suggesting there would be at issue the question of the right of the sovereign nation to take title as against the claim by the citizen that they either had no such right or there was created a right to compensation.

Mr. Olmstead. We examined that, but it is not our intention to have it affect that kind of case and I would hope it would not.

Mr. Fraser. You are saying it would be limited solely to situations where you actually—where what at issue was the title of the property, that is the major issue?

Mr. Olmstead. Yes."¹⁰

¹⁰After his appearance before the House Committee, Professor Olmstead wrote a letter to it changing his testimony (H. Hearings, p. 1306). The letter appears to have been written with this case in mind. We do not know what prompted Professor Olmstead to change position, but his letter is almost the only support that petitioner can cite in support of its interpretation of the law.

The day after Professor Olmstead's testimony, the Attorney General of the United States appeared to testify in opposition to the amendment. In his opening remarks, he said:

"What are we talking about in this amendment? We are talking about a very isolated, infrequent occurrence which is when American property that has been nationalized in some way or another finds its way back in the United States." (House Hearings, *supra*, p. 1235)

This same thought was repeated throughout his testimony. See pp. 1236, 1237. The Attorney General engaged in extensive colloquy with members of the Committee, all of whom spoke in terms of the protection of American-owned property expropriated abroad and then imported into the United States or some other foreign country (House Hearings, *supra*, pp. 1245, 1247).

Indeed, Mr. Gross, another member of the House Committee, urged a broadening of the amendment to enable the owner of expropriated property to seize Cuban property in the United States as an offset for the value of property seized (House Hearings, p. 1249)—*precisely the position taken by the petitioner in this case*—but no such proposal was adopted by Congress. The following colloquy was had between Attorney General Katzenbach and Mr. Gallagher

"Mr. Gallagher: This amendment merely applies to property that works its way back into the United States; correct?

Attorney General Katzenbach: Yes.

Mr. Gallagher: That it has no effect whatsoever on any property that continues to rest or vest in the country that has made the seizure?

Attorney General Katzenbach: That is correct." (House Hearings, p. 1247; see also colloquy between Professor Henkin and Mr. Gallagher at p. 1072.)

Later in the hearings before the House, a number of scholars in the field of international law testified to the

same effect. See, for example, the testimony of Prof. Metzger of Georgetown University, of Prof. Myres McDougal of Yale University and of Prof. Louis Henkin of Columbia University. (House Hearings, *supra*, pp. 1025, 1028, 1030, 1031, 1043, 1045, 1059, 1072, 1076).

At the same time, the Senate Foreign Relations Committee was also holding hearings and had before it a great deal of material submitted by both proponents and opponents of the bill. A letter from the Acting Legal Officer of the Department of State, to Senator Fulbright dated April 14, 1965, also understood the Hickenlooper amendment to apply to cases of the expropriation and resale of marketable property owned by citizens of the United States (Hearings before the Sen. Comm. on Foreign Relations on the Foreign Assistance Program, 89th Cong., 1st Sess. (1965), pp. 728-29). Appendix C of the record of the hearings consists in large part of material submitted by Senator Hickenlooper and others. (Sen. Hearings, *supra*, pp. 728-759). Again the prevailing theme is the protection of American property against expropriation and resale.

Substantially every member of Congress who expressed himself on the scope of the Hickenlooper amendment and every witness who testified on the bills in 1964 and 1965 agreed on the meaning of the amendment in this respect, if not on its desirability. That meaning of the law would not sanction its application to a situation such as this where no confiscated property has found its way back into the United States, but where petitioner seeks to use the property of respondent in its possession as a set-off against a claim it asserts against Cuba—precisely the situation disavowed by the sponsors of the amendment.

Still another reason for holding the Hickenlooper amendment inapplicable was stated by the Court of Appeals, when it noted that the contrary ruling would run counter to Congressional policy as expressed in Subchapter V of the International Claims Settlement Act of 1949, amended

October 19, 1965, Pub. L. 89-262 Sec. 1; November 6, 1966, Pub. L. 89-780 Sec. 1, 22 U.S.C. 1643-1643k. As the court there notes, Cuban assets in the United States have been frozen, and the effect of a judgment in favor of petitioner would be to give it a preference over other creditors (J.A. 65-68).

If applicable, the Hickenlooper amendment is unconstitutional. See Point IV, *infra*.

C. The act of state doctrine applies to counter-claims.

Petitioner seems to argue that the act of state doctrine does not apply here because petitioner's claim is pleaded as a counterclaim. Reliance for this position is based solely on an erroneous construction of *National City Bank v. Republic of China*, 348 U.S. 356.

The reasons for the act of state doctrine are set forth in considerable detail in the *Sabbatino* opinion. All of those reasons apply equally to a counterclaim. Whatever may have been the reasons for the ruling in the *Republic of China* case regarding sovereign immunity, they have no relevance to the issues presented in *Sabbatino*. Those issues were not discussed by the Court in the *Republic of China* case not by the parties in the briefs they submitted to this and the lower courts. The policy upon which the act of state doctrine is based has no relationship at all to accidents of pleading.

Petitioner's argument seems to be that it is entitled "in fairness" to reduce the judgment which would otherwise be entered in favor of respondent (Br. p. 10). But such abstractly formulated ethical considerations cannot substitute for a cause of action and can hardly form the basis of a decision by a court of law. Were a discussion of "fairness" ever to become relevant, the Republic of Cuba would, no doubt, have much to say concerning its view of the many decades of the exploitation of its natural resources and of the labor power of its people for the benefit of petitioner

and other United States corporations. These considerations, however, are political and can hardly be evaluated by this Court.

Nor is the dissent in *Pons v. Republic of Cuba, supra*, at p. 926, of any help to petitioner. It was based on the fact that petitioner was there seeking equitable relief by way of an injunction and counterclaim and that "where the moving party asks the court to settle accounts between the parties, that moving party has the obligation to render an account to the other litigant according to equitable principles" (p. 927). No analogous situation is presented on this record.

POINT III

If the act of state doctrine applies, petitioner has no cause of action.

Until this case reached this Court the theory on which petitioner placed principal reliance accepted the *Sabbatino* decision as applicable to its counterclaim and placed no reliance on the Hickenlooper amendment.¹¹ Recognizing

¹¹ After the passage of the Hickenlooper amendment, the District Court offered to petitioner an opportunity to discuss the applicability of the amendment to this case, then pending before it. Counsel for petitioner submitted a memorandum to the court declining the opportunity to present its views orally, stating:

"It has been the contention of the defendant bank, from the commencement of this action, that the obligation of Cuba was due and owing and that the counterclaim expressing that obligation up to the value of the amount sought in the complaint was a complete defense to the claim of Cuba and so was pleaded to defeat that claim. The contentions made by the defendant Bank in this case long antedated the Hickenlooper Amendment. It is the belief of the defendant that the Hickenlooper Amendment did not change, purport to change, nor intend to change the obligations of Cuba to pay for American-owned property it has confiscated and it is for this reason that it is believed unnecessary to make any further statement here concerning that new U. S. enactment."

the validity of the Cuban law, it claimed that it was nevertheless entitled to compensation.¹²

In its present brief petitioner presents two alternative theories of recovery which it calls "independent, but consistent" (Br. p. 6). One of these theories argues that the act of state doctrine is not applicable because of the exceptions discussed in Point II above. The other argues that even if there are no exceptions to the act of state doctrine, that doctrine "does not bar consideration of the legitimacy of petitioner's claim that the Cuban government is indebted to it . . ." (Br. p. 7).

Petitioner provides no hint as to the basis for the right of compensation on which it relies. It does not claim to rely on Cuban law which, it has argued, provides only illusory compensation.¹³

¹² So the petitioner, at page 19 of its first brief to the Court of Appeals, said:

"The distinctions [between the case at bar and *Sabbatino*] . . . are fundamental. In *Sabbatino* the validity of Cuban Law No. 851 was challenged; in the case at bar the validity of that law is not in issue. In *Sabbatino*, the former owners of confiscated property asserted that, notwithstanding a fully executed act of state, they continued to be the owners of the property; in the case at bar Citibank does not deny that Cuba effectively took Citibank's Cuban property; Citibank merely seeks some part of the compensation due it in consequence of that taking. In *Sabbatino*, Cuba sought no affirmative recovery from C.A.V. or *Sabbatino* (its claim was to the proceeds of sugar), and neither C.A.V. nor *Sabbatino* asserted counterclaims or offsets against Cuba; in the case at bar, *Cuba* seeks a money judgment against Citibank and Citibank denies that any amount is owing because of Cuba's offsetting money obligation to Citibank."

¹³ That law provides as follows:

"ARTICLE 5. The payment for the expropriated property shall be made, after the due appraisal thereof, in accordance with the following rules, to wit:

Petitioner seems to be alleging a right to recover from the Republic of Cuba because a tort, perhaps conversion, has been committed by it. But the conduct giving rise to these claims took place in Cuba and involved only property in Cuba. It is a most elementary rule of conflicts that such causes of action would be governed by Cuban and not by United States law. Petitioner has not argued that it is entitled to recovery under Cuban law.

Instead, petitioner seems to be arguing, first, that it is entitled to compensation, not under Cuban law and not under United States law but under something called "international law."

No authority is cited in support of the proposition that there are any provisions of international law which might give rise to such a cause of action in a court of law, independent of the law of the country in which the cause of action arose. Indeed, all of the authority is to the effect that such claims may be recovered only through diplomatic

a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this law.

b) For the amortization of said bonds, and by way of security therefor the Cuban State shall set up a sinking fund which shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3,000,000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents of a dollar per English pound (F.A.S.). To this end the National Bank of Cuba shall open a special dollar account which shall be captioned 'Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of North America.'

Bonds have not been issued and there are no funds out of which compensation can be made under the provisions of the law.

channels. See Point VII, *infra*. So, in *Shapleigh v. Mier*, 299 U.S. 468, this Court said at 471:

"The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedies to be followed are along the channels of diplomacy."

And in the *Ricaud* case, *supra*, at 310, this Court said:

"Whatever rights such an American citizen may have can be asserted only through the courts of Mexico or through the political departments of our government."¹⁴

POINT IV

The Hickenlooper amendment is unconstitutional.

A. The Hickenlooper amendment is unconstitutional because it represents a legislative interference with the judicial power.

From the earliest days of the Republic the Judiciary has jealously guarded its independence from either executive or legislative interference.

"... we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature,

¹⁴ In its first petition for certiorari, petitioner urged, as its fourth "Question Presented" the argument that an ex parte decision by Foreign Claims Settlement Commission was decisive in its favor. See Petition for Certiorari, pp. 3, 6. The point seems to have now been abandoned, though the fact of the Commission's action is recited at page 3 of petitioner's brief on the writ. In any event, respondent answered the argument in its opposition to that petition, at pp. 7 to 9 and reference is made thereto should the Court wish to consider that point.

is not a subject for judicial determination." *Den v. The Hoboken Land & Improvement Co.*, 59 U. S. (18 How.) 272, 284.

This Court has decided that the validity of a taking of property within its own territory by a foreign sovereign government is not a subject for judicial determination (376 U.S. at 428). Congress may not compel it to make such a determination, as it has here sought to do.

The Court in *Baker v. Carr*, 369 U.S. 186, had occasion to consider the circumstances under which political questions would be held to be nonjusticiable. It said on p. 217:

"It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it, or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Almost every one of these elements can be found in the instant case:

1. The issue has been constitutionally committed to coordinate political departments. The Court specifically held in *Oetjen v. Central Leather Co.*, *supra* at 302, that

"The conduct of the foreign relations of our government is committed by the Constitution to the

Executive and Legislative—"the political"—Departments of the Government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

2. The Court held in its opinion in *Sabbatino* that there was a "lack of judicially discoverable and manageable standards for resolving" the issue of the validity of Cuba's nationalization decrees. The Court said, at 376 U.S. 428:

"There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."

The Court concluded at p. 430:

"The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."

We will discuss, in another connection, the lack of manageable standards in resolving issues of compensation arising in nationalization cases. See Point VII, *infra*.

3. It is clear that it would be impossible for a court to decide questions such as this without an initial policy determination of a kind which cannot be made by a court. In this very case petitioner places heavy reliance on the fact that the State Department has made protest against Cuba's seizure of property owned by United States citizens through diplomatic representation and otherwise. Pet. Brief, p. 17. Such representations were obviously a result

of a policy determination by the Executive Branch. And, of course, the State Department has made a policy determination in this very case, as set forth in Mr. Stevenson's letter.

4. A court cannot, on this sort of question, undertake independent resolution of the issue without the possibility of conflict with coordinate branches of government and particularly with the Executive, and the potentiality of embarrassment arising from differing pronouncements by separate branches of the government is very high. There is, moreover "an unusual need for unquestioning adherence to a political decision already made" if the conduct of our foreign relations is not to be severely impeded by the possibility of judicial decisions at variance with political requirements.

The petitioner may answer, as did the district court, that under the Hickenlooper amendment the possibility of embarrassment of the Executive Branch is eliminated by the opportunity given to the President to avoid the effect of the amendment through the filing of an appropriate certificate pursuant to the second proviso of the statute. It is obvious, however, that the filing of a certificate of non-embarrassment may itself be embarrassing.

Whatever the President may certify at any particular moment, the possibility of embarrassment is inherent in this situation. The danger that the court and the Executive Branch will disagree on the merits of any case cannot possibly be avoided. Indeed, the history of the Cuban litigation shows that the Executive Branch in one administration may differ with the Executive Branch in the next.

Still another element of embarrassment arising from the Hickenlooper amendment was referred to by Abraham Chayes, Legal Advisor to the State Department at the time of the *Sabbatino* case. Mr. Chayes, speaking at a meeting of the Bar Association of the City of New York on Jan. 11,

1965, referred to the elements of embarrassment mentioned above and went on to say:

" . . . Present legislation is that it makes it awfully difficult for the Executive to carry on relations with a foreign government in the face of an effort to adjudicate . . . because the foreign government is not always going to be Cuba; it might be Chile or Brazil or a number of other countries with whom our relations have not broken down at all, and as soon as the case is filed they are going to turn around and . . . ask the State Department to prevent litigation, to ask them to get the President to say that the foreign relations of the United States, require that there should be no litigation here."¹⁵

We discuss below, in Point VII, some of the problems which would be faced by the courts in attempting to adjudicate the host of issues left open for adjudication were the Hickenlooper amendment held to be constitutional—difficulties which arise primarily from the fact that the questions are inherently nonjusticiable.

We do not argue and this Court need not find that all "political questions" or even all "foreign relations questions" are nonjusticiable. Some kinds of political questions are justiciable (*Baker v. Carr*, 369 U.S. at 211), just as some kinds of foreign relations questions are justiciable (*Sabbatino* at 428). But on the question presented by *this* case, this Court has already made its decision. A determination of nonjusticiability, like a determination of lack of jurisdiction, is an essential part of the exercise of judicial power and Congress may no more tell a court that it must decide a question it has held to be nonjusticiable than it can direct the court to take jurisdiction of a case over which the Constitution does not give it jurisdiction.

¹⁵ A transcript of the remarks by Mr. Chayes is available from the files of the Bar Association.

tion. Questions such as these involve many delicate policy considerations arising out of the court's "appropriate place" within our governmental structure, *Rescue Army v. Municipal Court*, 331 U.S. 549, 568, and are for the courts, not Congress, to decide.

On many occasions Congress has attempted to direct the courts to make judicial determination of issues which were not the subject of judicial determination. Without exception the Court has declined to do so. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409; *Gordon v. United States*, 69 U.S. (2 Wall.) 561¹⁶; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693; *Federal Radio Comm'n v. General Electric Co.*, 281 U.S. 464.

The changes of policy between this administration and the last, on this very issue, offer warning of the difficulties which may arise in any long-lasting litigation.

B. The Hickenlooper amendment, if applied to pending litigation, is unconstitutional.

Retrospective legislation is unconstitutional; to the extent to which it destroys pre-existing causes of action or pre-existing defenses, or retroactively creates a cause of action or defense where none existed before, it deprives a litigant of his property without due process of law.

Swayne & Hoyt Ltd. v. United States, 300 U.S. 297; *United States v. Lynch*, 292 U.S. 571; *Graham v. Goodsell*, 282 U.S. 409, 426; *William Danzer & Co., Inc. v. Gulf & S.I.R. Co.*, 268 U.S. 633; *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338; *Levy v. Wardell*, 285 U.S. 542, 544; *Noble v. Union River Log-*

¹⁶ For a detailed discussion, see the opinion prepared for the Supreme Court by Chief Justice Taney, printed at 117 U.S. 567.

ging R. Co., 147 U.S. 165, 176; *Society for the Propagation v. Wheeler*, Fed Cas. No. 13,156.¹⁷

Cases which appear to be authority to the contrary for the most part involve remedial or procedural statutes not affecting substantive rights or cases involving statutory rights which were created by the Legislature and may be destroyed by the Legislature. Such, for example, are *Campbell v. Holt*, 115 U.S. 620; *Chase Securities Corp. v. Donaldson*, 325 U.S. 304; *Battaglia v. General Motors Corp.*, 169 F. 2d 254 (2d Cir. 1948) and *Asselta v. 149 Madison Avenue Corporation*, 79 F. Supp. 413 (S.D.N.Y. 1948).

POINT V

Banco Nacional de Cuba is not liable for the obligations of the Republic of Cuba and hence the counterclaim does not state a cause of action.

Petitioner, in its answer alleged:

"This action is brought by and for the benefit of the Republic of Cuba, by and through its agent, a wholly owned instrumentality, the plaintiff herein, which is in fact and law and in form and function an integral part and indistinguishable from the Republic of Cuba." (J.A. 17)

There is not a scintilla of evidence in the record to justify this conclusion. To the extent to which the relationship between Banco Nacional and the Republic of Cuba was discussed at all, the record can support only a contrary conclusion, i.e., that Banco Nacional is an autonomous entity separate from the Government of Cuba with a capital and identity of its own and that it is not respon-

¹⁷ A strong Congressional policy against retroactive operation of statutes extinguishing substantive rights is reflected in 1 U. S. C. § 109 and reflects Congressional sensitivity to this constitutional issue.

sible for the debts of the Government of Cuba. The most that can be said (and even this is stretching a point) is that a question of fact is raised as to the relationship of the parties under Cuban law.¹⁸

The Court of Appeals did not reach this issue, although it found "some justification" in respondent's argument (J.A. 54). There is no evidence at all to support the contrary finding of the District Court that "the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation" (J.A. 37). The only argument in support of that finding appears in footnote 3 of the District Court's opinion, where the District Court suggests that plaintiff's position is "flatly inconsistent with the sovereign immunity argument".

In the first place, Banco Nacional has not in this suit pleaded sovereign immunity. In the second place, when, in other litigation, Banco Nacional has pleaded sovereign immunity the plea has been overruled. *French v. Banco Nacional, supra*. It hardly seems consistent to deny sovereign status to Banco Nacional when it seeks to assert sovereign rights, but to attribute such status to Banco Nacional when such attribution is harmful to its cause.

¹⁸ The statutes creating the bank and the unchallenged affidavit of Dr. Lopez Gonzales make it abundantly clear that Banco Nacional is an autonomous state instrumentality with an identity and capital of its own and that under Cuban law it is not responsible for the debts of the Republic of Cuba. Indeed, Art. 2 of Law 930 of February 23, 1961 (an English translation of which is annexed to the Lopez Gonzales affidavit as Ex. 2) specifically provides that the plaintiff "shall not answer for the obligations of the state or other government agencies and state enterprises, unless such obligations have been expressly assumed". The law further provided (as had the 1948 law which created the plaintiff) that the plaintiff had an independent juridical status (Art. 1 of Law 930), that it had a capital structure of its own (Art. 6) and that it had its own "functional autonomy" (Art. 11).

Nor is it of any significance that "throughout the *Sabbatino* litigation it was recognized by every court concerned that Banco Nacional de Cuba was an instrumentality of the Cuban government" (J.A. 37). Of course it is, but it does not follow that Banco Nacional is responsible for the debts of the government.

Corporations similar in their organic structure to Banco Nacional exist not only in Cuba, but in almost every country in the world. We ourselves have at least forty such corporations. See 31 U.S.C. § 846. But we have never heretofore heard it even proposed that each or any of these corporations can be held responsible for the debts of the government. It is perhaps for this reason that we can find no cases directly in point. We respectfully suggest that such a contention is preposterous on its face.

There are, however, many analogous situations in which a court has had occasion to consider the relationship between a wholly owned "instrumentality" of a government and the government itself. The courts have held, without exception so far as we know, that a corporation, even if wholly owned and controlled by a government, either our own or foreign, is still a separate entity. This conclusion has been reached even when, unlike the present situation, a foreign government has asserted the substantial identity of the government and the corporation.

"A suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government." *United States v. Deutsches Kaliayndikat Gesellschaft*, 31 F. 2d 199, 202 (S.D.N.Y. 1929).

See also *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549; *United States v. Strang*, 254 U.S. 491; *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 F. 575 (S.D.N.Y. 1920).

Banco Nacional is wholly owned by the Cuban Government and, of course, it is an instrumentality of the Cuban Government. So, too, the Tennessee Valley Authority and the Home Owners Loan Corporation (to pick two examples at random) are instrumentalities of the United States Government wholly owned by it. It does not follow that Banco Nacional is responsible for the obligations of the Republic of Cuba any more than that the TVA or the HOLC is responsible for the debts of the United States. Such a proposition is so unreasonable that we do not know that it has ever been seriously argued. The closest factual situations we have found are in cases like *United States ex rel. TVA v. Lacy*, 116 F. Supp. 15 (N.D. Ala. 1953); *rev. on other grounds*, 216 F. 2d 233 (5th Cir. 1954) in which the court held that in a suit by the United States, a counterclaim may not be pleaded alleging a debt of a wholly owned instrumentality of the United States. And, of course, it is well established that these wholly owned government instrumentalities are not entitled to sovereign immunity. *Keifer and Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381.

It may be true that in some litigation, particularly in *Sabbatino and Banco Nacional v. Farr*, 383 F. 2d 166 (2d Cir. 1967) *cert. den.* 390 U.S. 956, no sharp effort was made to distinguish between Banco Nacional and the Cuban Government. This was so because in those cases the distinction was not relevant. In those cases no one was seeking to hold Banco Nacional liable for damages because the Republic of Cuba had confiscated the sugar involved in those cases, as the petitioner seeks to hold Banco Nacional liable in this case for damages because the Republic of Cuba has confiscated its bank.

POINT VI

Respondent is suing in its own right and petitioner's counterclaim is against the Republic of Cuba and hence is not "a claim against an opposing party" within the meaning of Rule 13, Federal Rules of Civil Procedure.

Even if it be held that Banco Nacional is in some way an agent or representative of the Government of Cuba, a claim against it in that capacity may not be made the subject of a counterclaim under Rule 13. "Opposing parties" as used in Rule 13 connotes not only that, in the case of a counterclaim, the plaintiff must be the same person as the person suing the defendant, but that the capacity in which he is sued must be the same as the capacity in which he sues. It is and always has been the law that "the cause of action to be counterclaimed must be against and between the same parties, and between them in the same capacity". *Zion v. Century Safety Control Corp.*, 258 F. 2d 31 (3rd Cir. 1958); *Pioche Mines v. Fidelity-Philadelphia Trust Co.*, 206 F. 2d 336, 337 (9th Cir. 1953, *cert. den.* 346 U.S. 899); *Higgins v. Shenango Pottery Co.*, 99 F. Supp. 522 (W.D.Pa. 1951); *Chambers v. Cameron*, 29 F. Supp. 742 (N.D. Ill. 1939). Similarly, in an interpleader suit where the plaintiff asserted no claim to the interpleaded fund, a counterclaim could not be asserted by one of the claimants against the plaintiff since they were not opposing parties. *Erie Bank v. United States District Court*, 362 F. 2d 539 (10th Cir. 1966).

The general rule is that to come within the purview of Rule 13 an "opposing party" must be one who actually asserts a claim against the prospective counterclaimant and who asserts that claim in the same capacity as that in which he is counterclaimed against. *Cf. Cravatts v. Klozo Fastener Corp.*, 15 F. R. D. 12 (S.D.N.Y. 1953).

Hence, petitioner's counterclaim against the Republic of Cuba cannot be pleaded in this action. It is abundantly clear that respondent's claim against the petitioner is a claim brought by a bank in its capacity as a bank and a counterclaim cannot be brought against it as a representative of the entire Cuban nation.

Directly in point is *United States ex rel. TVA v. Lacy*, *supra*. In that case, the TVA sued as an agent of the United States. The defendants sought to interpose a counterclaim against the TVA in its individual capacity as an independent, although wholly controlled arm of the federal government. The Court dismissed the counterclaim, finding that the TVA, in its individual capacity (as opposed to its capacity as agent of the federal government) was not "an opposing party" within the meaning of Rule 13. *Id.* at p. 21.¹⁹

See also *Epstein v. Shindler*, 26 F.R.D. 176 (S.D.N.Y. 1960); *First National Bank v. Johnson County National Bank & Trust Co.*, 331 F. 2d 325 (10th Cir. 1964); *Durham v. Bunn*, 95 F. Supp. 530 (E.D. Pa. 1949).

Rule 13 did not change Equity Rule 30 in any respect relevant to this issue (see Notes of Advisory Committee on Rules at 28 U.S.C.A., Note to Rule 13). The practice prior to the adoption of the rules in 1937 was the same. *Southern Railway Co. v. Elliott*, 86 F. 2d 294 (4th Cir. 1936); *Federal Reserve Bank v. Early*, 30 F. 2d 198 (4th Cir. 1929); *aff'd* 281 U.S. 84; *Libby v. Hopkins*, 104 U.S. 303; *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610.

It was Banco Nacional and not the Republic of Cuba which instituted suit against the petitioner in the instant

¹⁹ In a *qui tam* action where the government sues on behalf of an individual (i.e. non governmental) informer, the same rules apply and a counterclaim may only be interposed against the true "opposing party". See *United States ex rel. Rodriguez v. Weekly Publications*, 74 F. Supp. 763, 768-69 (S.D.N.Y. 1947) for a discussion of how this determination of the real "party" is made for Rule 13 purposes.

action.²⁰ Hence, Rule 13 would limit counterclaims to those against Banco Nacional *qua* bank; no counterclaims could lie against Banco Nacional *qua* Republic of Cuba as it was not an opposing party in the action.

POINT VII

The nationalization of petitioner's property in Cuba did not violate international law and in any event no action would lie in a court of law to recover the value of such property.

If this Court should decide that the act of state doctrine does not apply and that the record supports the counterclaim against respondent, the Court will be faced with what are perhaps the most troublesome problems of all: it must ascertain what substantive standards of international law are to be applied in determining whether the Cuban expropriation decrees did violate international law and if so, what a United States municipal court can do about it. These questions were not reached by either the majority or the dissenting opinions in *Sabbatino*.

International law is generally defined as those rules of conduct which states commonly observe in their relations with each other. Thus, 1 Hyde's *International Law* (2d Rev. Ed. 1945) opens with this sentence (p. 1):

"The term international law may be fairly employed to designate the principles and rules of con-

²⁰ This is, of course, the exact opposite situation to that in *National City Bank of New York v. Republic of China*, *supra*, where it was the Republic which sued to collect money deposited in the defendant bank by one of its governmental agencies. Since it was the named party there, a counterclaim was permitted against it as the Republic of China, although no counterclaim would presumably have lain against its agency, the Shanghai-Nanking Railway Administration.

duct declaratory thereof which States feel themselves bound to observe and, therefore, do commonly observe in their relations with each other."

1 Oppenheim's *International Law* (Lauterpacht's 8th Ed. 1955) states:

"The sources of International Law are therefore twofold, namely (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, that is, implied consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct. (p. 25)

The writings of learned scholars, and practicing attorneys, *unless* they reflect actual practice, are likely to be merely theories as to what the law ought to be in an idealized international community.²¹ Even if all of the writers were to agree on proper principles of international law (and they do not), such principles would not become international law without general concurrence of the nations of the world in actual practice. This principle has been recognized by this Court in one of the hardest cases ever to be decided by it. *The Antelope*, 23 U.S. (10 Wheat.) 66.

As this Court said in *Sabbatino*:

"There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public pur-

²¹ This Court has said, concerning such writings: "Such works are resorted to, not for the speculations of their author concerning what the law ought to be, but for the trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700.

pose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries; although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect 'imperialist' interests and are inappropriate to the circumstances of emergent states.

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." [Footnotes omitted; pp. 428-430.]

Perhaps the best exposition of the different opinions between "capital importing" and "capital exporting" nations can be found in the exchange of diplomatic correspondence between the United States and Mexico in which Secretary Hull expressed the traditional view of the United States—a view upon which petitioner heavily relies (Br., pp. 19, 20). But the view of the United States does not make international law and the opposing view is set forth with equal firmness by Mexico in response to Secretary Hull. The exchange is too long to set forth here, but the Court is respectfully referred to the correspondence in its entirety, which outlines the two views with admirable explicitness. ([1938] 5 For. Rel. U.S. 679-702.)

The literature on the subject is voluminous and in sharp conflict.²² And the problem is far from an academic one—almost every undeveloped country is considering or has already effectuated the nationalization of private property. That there exist widespread differences in international practice is, as we shall see, an understatement.

We have prepared as an appendix to this brief a summary analysis of the principal nationalizations (excluding

²² For a sampling see: *Books*—Domke, *International Aspects of European Expropriation Measures* (1941); Foighel, *Nationalization; A Study in the Protection of Alien Property in International Law* (1957); Friedman, *Expropriation in International Law* (1953); Nishoff, *Confiscation in Private International Law* (1956); Re, *Foreign Confiscations in Anglo-American Law* (1951); U. S. Dep't of State, *Compensation for American-Owned Lands Expropriated in Mexico* (1939); G. White, *Nationalization of Foreign Property* (1961); Wortley, *Expropriation in Public International Law* (1959).

Articles—Abdel-Wahab, *Economic Development Agreements and Nationalization*, 30 U. Cinc. L. Rev. 418 (1961); Allison, *Cuba's Seizure of American Business*, 47 A. B. A. J. 48 (1961); Baade, *Expropriation of Foreign Private Property and The Decline of the Act of State Doctrine*, 1963 J. Bus. L. 182; Becker, *Just Compensation in Expropriation Cases: Decline and Partial Recovery*, 53 Am. Soc. Int'l Proc. 336 (1959); Dawson and Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 30 Fordham L. Rev. 727 (1962); Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 Am. J. Int'l L. 585 (1961); Domke and Baade, *Nationalization of Foreign-Owned Property and the Act of State Doctrine—Two Speeches*, 1963 Duke L. J. 281; Drucker, *Compensation Treaties Between Communist States: An Addendum*, 10 Int'l and Comp. L. Q. (1961); Farchiri, *Expropriations and International Law*, 1952 Brit. Int'l L. 15; Graving, *Shareholder Claims Against Cuba*, 48 A. B. A. J. 226 (1962); Katzarov, *Validity of the Act of Nationalization in International Law*, 22 Modern L. Rev. 639 (1959); Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 Fordham L. Rev. 177 (1959); Kutner, *Habeas Proprietatim: An International Remedy for Wrongful Seizures of Property*, 38 U. Det. L. J. 419 (1961); Mann, *Outlines of a History of Expropriation*, 75 L. Q. Rev. 188

Cuba) which have taken place since 1917. A few observations should be made concerning this data:

1. In a large number of cases—certainly those involving the greatest dollar value of property seized—the host country denied any obligation to make any compensation at all (e.g., Soviet Union, China, Indonesia, Mexico, Eastern Europe). In some of these cases, some payment was made but it was, in the mind of the host country, *ex gratia*.

2. In many cases where the host country offered compensation because it was required to do so under its own law, the compensation was more than balanced by large assessments for damages, back taxes, excess profits, etc., so that the net compensation was zero (e.g. Peru, Chile, Algeria).

3. In a large number of cases where compensation was nominally made, its value is impossible to calculate because it was in the form of long term bonds, ultimate payment of which is uncertain, and/or it was dependent upon future market conditions and/or it was part of a package deal involving inter-governmental loans (e.g. Bolivia, Ceylon, Czechoslovakia).

(1959); Metger, *Act of State Doctrine and Foreign Relations*, 23 U. Pitt. L. Rev. 881 (1962); Patty, *Tax Aspects of Cuban Expropriations*, 16 Tax L. Rev. 415 (1961); Re, *Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 Mich. L. Rev. 1079 (1962); Reeves, *Cuban Situation: The Political and Economic Relations of the U. S. and Cuba*, 17 Bus. Law 980 (1962); Rheinstein and Wortley, *Observations on Expropriation*, 7 Am. J. Comp. L. 86 (1958); Seidl-Hohenveldern, *Communist Theories on Confiscation and Expropriation: Critical Comments*, 7 Am. J. Comp. L. 541 (1958); Timberg, *Expropriation Measures and State Trading*, 55 Am. Soc. L. Proc. 113 (1961); Todd, *Winds of Change and the Law of Expropriation*, 39 Can. B. Rev. 542 (1961); Williams, *International Law and the Property of Aliens*, Brit. Yb. Int'l L. 1 (1928); Wortley, *Protection of Property Situated Abroad*, 39 Tul. L. Rev. 739 (1961); Rafat, *Compensation for Expropriated Property in Recent International Law*, 14 Villanova Law Review 199 (1969).

4. In every case in which compensation was made it was the result of inter-governmental negotiations or negotiations between the host country and the foreign investor.

5. *In no case did judicial proceedings play any role whatsoever in determining the amount of compensation.*

6. In cases in which settlements were reached as a result of inter-governmental negotiations it is clear that political as well as economic considerations were of primary importance.

Lest we become self-righteous, it should be noted that the United States itself has within recent memory confiscated the property of aliens without paying them any compensation. A current example can be found in the Cuban Assets Control Regulations, 31 C.F.R. 515.101 *et seq.* as a result of which the assets of Cubans in the United States have been seized. See *Sardino v. Federal Reserve Bank*, 361 F. 2d 106 (2d Cir. 1966), *cert. den.* 385 U.S. 898. An even more widespread example of American confiscation of foreign property was effectuated by the Gold Clause Resolution of June 5, 1933 (31 U.S.C. §§ 462, 463), which resulted in the confiscation of a substantial portion of the value of United States Government bonds. *Perry v. United States*, 294 U.S. 330. To the extent that such securities were held by non-residents of the United States, it resulted in a confiscation of the property of foreigners without compensation. See 29 Amer. J. of Int'l L. 310, 1935. It was estimated, at the time of the Resolution, that at least \$100,000,000 in United States bonds was so affected. New York Times, Feb. 19, 1935, p. 15, cols. 3 and 4.²³

Prior to *Sabbatino*, no court in the United States and very few courts anywhere in the world had ever attempted

²³ That the Resolution was, in fact, an outright confiscation, *pro tanto*, of the property of aliens, has not escaped the attention of other countries. See the views of Mexico, in its note of Sept. 1, 1938 [1938] 5 For. Rel. U. S. 698.

to formulate standards of international law by which to determine the validity of a general nationalization of property by a socialist or nationalist regime,²⁴ and no court anywhere has ever considered the possibility that a national court could enter a judgment based on the value of property nationalized by another state. Even in *Sabbatino*, the issue was only title to a cargo of sugar, and not the value of property nationalized. The District Court in *Sabbatino* did attempt to formulate, in the most general and abstract way, a rule to determine the validity of the Cuban expropriations (193 F. Supp. 375 at 384-386); the Court of Appeals in *Sabbatino* rejected even that general rule and proposed another, equally generalized (307 F. 2d 845 at 864). This Court refused to accept either formulation, but pointed merely to the overwhelming difficulties in adjudicating the problem.

The Court of Appeals refused to find that lack of compensation alone was a violation of international law, but found instead such a violation in lack of compensation *plus* the allegedly retaliatory and discriminatory treatment of the sugar company involved in that case. But the Cuban expropriation of the property of the petitioner was neither retaliatory nor discriminatory. It was not discriminatory because it was part of a general nationalization of all bank-

²⁴ The only two cases we have ever seen which attempted this task were *Anglo-Iranian Oil Co. v. Jaffrate* (the *Rose Mary*) [1953], 1 Weekly L. R. 246, and *Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R.* (Rome) [1955], Int'l L. Rep. 23. In the first of these cases (which was subsequently criticized by the Court of Chancery in *In re Helbert Wagg & Co. Ltd.* [1956], 1 Ch. 323), an English colonial court at Aden found that the Iranian Oil Nationalization Decree of 1951 was in violation of International law because it did not provide adequate compensation to the owners of the oil wells. In the latter case, the Rome court found the opposite, namely, that the nationalization decree *did* provide adequate compensation. To complete the picture, the Tokyo court, in *Anglo-Iranian Oil Co. v. Idemitsu Kasan Kabushike Kaisha* [1953] Int'l L. Rep. 305, in considering the same nationalization decree, could find no standards of international law to apply.

ing in Cuba, both foreign and domestic, and indeed part of the process of the nationalization of substantially all business in that country.²⁵

Nor was the nationalization of the petitioner's bank "retaliatory". The Court of Appeals found that the Cuban nationalization was a retaliation against the congressional amendment to the Sugar Act of 1948 (Public Law 86-592, 74 Stat. 331, amending Act of August 8, 1947, 34 U.S.C. 1100-1161). But Cuba considered that Act itself retaliation against Cuba, and the Court of Appeals, in its *Sabbatino* decision (at p. 865) conceded that the purpose of the amendment to the Sugar Act "was to impose a sanction against an unfriendly nation". Cuba accordingly regarded it as a violation of the Buenos Aires Protocol of Non-Intervention of December 23, 1936 (51 Stat. 41, T.S. 923; 188 L.N.T.S. 31) and the Charter of the Organiza-

²⁵ There is a voluminous literature on the subject of Cuban expropriations. See, for example, Huberman & Sweezy, *Anatomy of a Revolution* (1960); Williams, *The United States, Castro and Cuba* (1962); Morray, *The Second Revolution in Cuba* (1962); Phillips, *Island of Paradox* (1960); Smith, *The United States and Cuba* (1960); Zeitlin and Scheer, *Cuba: Tragedy In Our Hemisphere* (1963).

The easiest reference in English to the specific nationalization decrees can be found in the files of the New York Times which, from time to time, reported the progress of nationalization. The first important nationalizations took place with the passage of the Agrarian Reform Act of May 17, 1959. By December 8, 1960 substantially every major enterprise in Cuba, whether owned by Cubans or by aliens, was nationalized. So far as the banking industry was concerned, the first nationalization was of the Chinese (Taiwan) Bank on September 5, 1960 (New York Times, September 6, p. 18, col. 4). United States banks were nationalized on September 17, 1960 and Cuban owned banks on October 13, 1960 (New York Times, October 15, 1960, p. 1, col. 8). Canadian banks were nationalized on December 8, 1969. No compensation was paid for any of these nationalizations. It is difficult to see how any finding of discrimination can be made in these circumstances. The element of discrimination found by the Court of Appeals in *Sabbatino* (at p. 867) was not present in the case of the nationalization of the banks.

tion of American States (2 U.S.T. 2395; T.I.A.S. 2361), particularly Art. 15 thereof. Actually the whole concept of retaliation is a political one and it would require the wisdom of a Solomon to determine who was retaliating against whom, at what point in time.

The major difficulty in attempting a judicial determination of all of these problems, of course, arises from the fact that they are political and not juridical in their essence. Samy Friedman, *Expropriation in International Law* 206, 207; Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 *Amer. J. of Int'l L.* 801, 803 (1960), And so the Court in *Sabbatino* wisely determined that this was an area in which judicial intervention could only impede rather than strengthen the cause of international law, and that problems of this nature had best be left to the traditional method of inter-governmental negotiations. To seek to formulate out of the practice of nations in this area anything even remotely resembling a rule of law is, we submit, a fruitless task.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

We present below a discussion of some basic data on compensation in most of the important nationalizations taking place since 1917. It will appear that the amount of compensation paid in these nationalization cases has ranged from nothing at all to a figure which has been generally acceptable to the investor. There is great variation both in theory and in practice as to what constitutes the "real value" of expropriated property, as well as the "real value" of different forms of compensation so that no general rules governing these concepts can be attempted.

The first significant nationalizations in modern times were those resulting from the Russian revolution of 1917. The Soviet Government has consistently denied any liability in international law for compensation for such nationalization and has made only minor voluntary payments as part of political settlements made long after the nationalizations took place.¹

In the 1920s and 1930s, there were extensive expropriations in Mexico involving, primarily, United States and British interests. American agrarian and non-petroleum claims were settled by the Mexican-American Agreement of 1941, although the Mexicans, like the Russians, denied any obligation to make any payment at all under international law.² The claimants valued their property at over \$350 million. They were settled for \$40 million, to be paid out

¹ The Soviet view on nationalization is best expressed by Bystricky in *Notes on Certain International Problems Relating to Socialist Nationalization*, International Association of Democratic Lawyers, Proceedings of the Commission on Private International Law, 6th Congress (1956) 15. See also Doman, *Post-War Nationalization of Foreign Property in Europe*, 48 Col. L. Rev. 1125, 1143-1158.

² See *Exchange of Correspondence, United States and Mexico* [1938] 5 For. Rel. U. S. 679-702.

over a period of years.³ Leaving aside the fact that money paid out over a number of years has less value than immediate cash, the settlement at best equals only 11% of the amount claimed. Similarly, the United States petroleum claims against Mexico, amounting to \$260 million, was settled in 1942 for \$24 million plus interest at 3%.⁴

British oil interests, on the other hand, valued their property at substantially the same amount and received \$130 million, including interest.⁵ This wide discrepancy would seem to validate Dawson and Weston's conclusion that "despite the homage paid to those principles [of prompt, adequate and effective compensation, advanced by the United States and Great Britain], political, economic and wartime realities were apparently the decisive factors contributing to the compromise settlements."⁶

The next major round of nationalizations occurred in Eastern Europe in the early post-World War II period. The United States made a settlement with Yugoslavia in 1948 for \$17 million in cash to meet claims estimated at \$150 million. At the time, the United States then held \$46.8 million of Yugoslavia's gold and could have recovered at least that amount simply by vesting that sum in the United States and distributing it proportionately among claimants.⁷ Clearly, the "generous" terms given to Yugoslavia was due to the political situation within Eastern Europe in 1948 and the desire of the United States to

³ Dawson and Weston "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 30 Fordham L. Rev. 727, 740, 741 (1962).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Id.* at 742.

⁷ *Id.* at 743, 744. This was the procedure followed in the cases of Hungary, Bulgaria and Czechoslovakia. See Public Law 285, 84th Cong. and Public Law 604, 85th Cong.

buttress the position of Yugoslavia vis-a-vis the Soviet Union.

A similar lump sum settlement made between the United States and Rumania in 1960. The United States at that time held frozen assets of \$22 million as against claims of \$85 million which had been found by the Foreign Claims Settlement Commission. By the 1960 settlement, Rumania added \$2.5 million to the frozen assets payable over 4 years.⁸ This settlement, like that with Yugoslavia, presumably reflected some United States desire for political accommodation with Rumania.

Great Britain also had extensive claims against Eastern European nations for post-war nationalizations. The largest of these was against Czechoslovakia. Great Britain agreed to accept eight million pounds for claims totalling over one hundred million pounds. Moreover, the money was to be paid out over ten years and apparently out of Czechoslovakian profits from exports to Great Britain which were agreed upon in the settlement agreement. Furthermore, Great Britain was to provide loans to Czechoslovakia to assist it in its economic recovery.⁹

A similar package deal was made between Great Britain and Yugoslavia in 1949 by the terms of which Yugoslavia paid 4.5 million pounds in payment of claims totalling 25 million pounds.¹⁰ Other Western European nations negotiated comparable agreements.¹¹

In 1949, properties of very great value were nationalized by the Chinese Communist Government which came to power in that year. British claims alone are estimated at \$400 million.¹² No compensation at all has ever

⁸ *Id.* at 743.

⁹ *Id.* at 744.

¹⁰ *Id.* at 744.

¹¹ *Id.* at 744.

¹² Clubb, *Twentieth Century China* (1964), p. 322.

been made for these expropriations, and China has steadfastly refused even to discuss a possible settlement of claims.

In the 1950s, the two most important nationalizations which were ultimately settled, were those involving the tin mines in Bolivia and the Suez Canal in Egypt.

In 1952, following a revolution, the Bolivian Government seized three tin mining companies which dominated the economy of that country. All three were largely foreign owned, and those owners placed a value of at least \$60 million for their interest in the mines. The Bolivian Government, on the other hand, claimed that the companies owed \$520 million for illegal profits, back taxes, etc.¹³ Ultimately, an agreement was reached under which \$20.2 million was promised by the Bolivian Government.¹⁴

A serious question, however, can be raised as to how much of this compensation will come from Bolivia and how much from the American taxpayer. In the first place, the compensation was to be paid out over a number of years. More important, it was part of a package representing a political and economic accommodation between the United States and Bolivia. Bolivia agreed to allocate a percentage of its revenues as compensation for the American owned tin interest only so long as tin prices remained above a specified level. In exchange, the United States agreed to buy 15,000 tons of tin at world market price (valued at about \$30 million), to increase Point Four aid to Bolivia by \$1.5 million a year and to provide new technical assistance.¹⁵

The Suez Canal controversy is too complicated to discuss at length here. An agreement was ultimately reached

¹³ Thomas, in 1 Proceedings of the 1959 Institute on Private Investments Abroad 437.

¹⁴ Eder, *Inflation and Development in Latin America: A Case History of Inflation and Stabilization in Bolivia* (1968), p. 549.

¹⁵ Thomas, *supra*, 437.

in 1958 by which Egypt agreed to pay 28.4 billion francs over five years, without interest. No agreement was ever reached on the value of the properties seized. The valuation used by the Egyptian Government was 81.8 billion (old) French francs. The company, on the other hand, contended that the property was worth well over 100 billion francs.¹⁶

There were three other important nationalizations in this period. Two of them were eventually cancelled by changed political conditions. In 1951, the Mossadegh Government in Iran nationalized the Anglo-Iranian Oil Company, whose assets were estimated to have a value of one billion dollars. That government, however, was overthrown by a coup d'etat before a settlement was reached and the nationalization decrees were significantly revised.¹⁷

In 1953, the Arbenz Government of Guatemala seized the lands of United Fruit Company; the next year the regime was overthrown and the expropriations were cancelled.¹⁸

The last major seizure of the 1950s was that of Dutch properties in Indonesia involving assets claimed to have a value of \$1 billion. The Indonesian Government denied that under international law it had any obligation to pay compensation but that it would make payments in accordance with its own law. That law provided that the amount and form of compensation were to be determined by a government appointed committee whose findings were reviewable by the Indonesian Supreme Court. Among other things, the Indonesian Government took the position that Indonesia's ability to pay would be a factor in the com-

¹⁶ Dawson and Weston, *supra*, 748, 749; Rafat, *Compensation for Expropriated Property in Recent International Law*, 14 Villanova L. Rev. 236 (1969).

¹⁷ Dawson and Weston, *supra*, at 747; Wise and Ross, *The Invisible Government* (1964), pp. 110, 111.

¹⁸ Horowitz, *The Free World Colossus* (1965), p. 184.

pensation. The Dutch Government refused to accept this procedure and to date the claims have apparently not been settled.¹⁹

In the early 1960s there were a series of nationalizations in Latin American of the electrical utility properties of American and Foreign Power Company, Inc. (AFP). For its properties AFP received in notes, payable in dollars, amounting \$69.6 million dollars from Mexico, \$47.8 million from Argentina, \$30.3 million from Columbia, \$152.7 million from Brazil, \$86.5 million from Chile and \$10.5 million from Costa Rica. These notes bore interest rates between 6% and 7.75% and had maturities ranging between 15 and 41 years. In the case of Mexico, Argentina and Chile, the agreement required AFP to reinvest in those countries some of the compensation thus received.²⁰

Unfortunately, it is almost impossible to evaluate the compensation actually received, since there is no ready market for such notes and given the volatile situation in Latin America, no note payable 10, 20 or 30 years hence can be regarded as a safe investment. Thus, the Securities & Exchange Commission, in considering the value of the properties of AFP, said:

"Neither First Boston nor Lazard, despite their experience in handling and appraising the securities of Latin American governments, attempted to place a dollar value on the foreign government obligations. Both expressed the view . . . that the obligations would sell at a substantial discount if they were placed on the market." (S.E.C. Investment Co. Release No. 5215, Dec. 28, 1967)

In 1962, the American oil companies in Ceylon were nationalized. Estimates of the value of the property

¹⁹ Rafat, *supra*, 239-242.

²⁰ Ebasco Industries, Inc. Annual Report 1968, p. 6; American Foreign and Power Co. Annual Report 1964, pp. 8-11; Electric Bond and Share Co. Annual Report 1967, p. 13.

ranged between \$13.6 million and \$20 million.²¹ A settlement was ultimately reached when Ceylon agreed to pay slightly more than \$11 million. The payment, however, was not in hard currency, but in rupees. Furthermore, the payment was partly to be covered by a loan from Great Britain and partly by resumption of foreign aid from the United States.²²

In 1963 the Argentine government annulled long term exploration contracts which had been made with foreign oil companies in 1956.²³ There was a strong protest from the United States and finally the claims were settled. Once again payments were to be spread over a number of years and there were non-cash elements in the settlement. The American companies evaluated their interests at between \$375 million and \$400 million and the face value of the compensation received was \$230 million.²⁴

In August, 1965, Indonesia, then under the leadership of President Sukarno, announced its intention to nationalize Royal Dutch Shell and two American owned companies, Caltex and Standard Vacuum.²⁵ The Sukarno government was overthrown in December 1965, and the plans to nationalize the American oil companies were annulled. Royal Dutch Shell, however, was nationalized with compensation of \$110 million.²⁶ At the same time other properties in Indonesia belonging to American companies, like

²¹ New York Times, July 4, 1965, p. 4, col. 1; 63 Oil and Gas Journal 113 (December 27, 1965).

²² New York Times, July 29, 1965, p. 34, col. 7; New York Times, July 4, 1965, p. 4, col. 1.

²³ Tanzer, *The Political Economy of International Oil and the Underdeveloped Countries* (1969), pp. 353, 354.

²⁴ 65 Oil and Gas Journal, p. 61 (January 9, 1967); New York Times, October 26, 1963, p. 45, col. 4; New York Times, November 16, 1963, p. 1, col. 1.

²⁵ Wall Street Journal, August 11, 1965, p. 26, col. 2.

²⁶ Wall Street Journal, December 31, 1965, p. 26, col. 5.

Goodyear and Uniroyal, which had been nationalized in 1965, were restored to their owners in 1967 as part of a general political realignment within the host country.²⁷

In 1961 Iraq nationalized substantially all of the oil properties owned by foreigners. Successive governments have steadfastly refused to pay any compensation at all for the properties seized.²⁸

There have been three more recent major nationalizations involving oil properties. In 1968 the Peruvian government nationalized the oil properties of International Petroleum Company, a subsidiary of Standard Oil of New Jersey, which the latter valued at \$120 million.²⁹ The Peruvian government counterclaimed that IPC had illegally exploited its oil fields since 1924 and actually owed \$690 million to the Peruvian government as a result thereof.³⁰ No compensation was ever paid for the properties in question and in June 1970 Charles Myers, Assistant Secretary of State for Latin American Affairs, advised the government of Peru that the controversy over the IPC nationalizations was no longer a major issue between the countries.³¹ At about the same time Peru also nationalized the sugar plantations of W. R. Grace, paying for them in either stocks or bonds. Grace has written off the investment at a loss of 18 million dollars.³²

In 1969 Bolivia nationalized the property of Gulf Oil, in which the latter had invested 150 million dollars over the previous 13 years.³³ A settlement was reached in September 1970, by which Bolivia agreed to pay 78.6

²⁷ Wall Street Journal, February 15, 1967, p. 32, col. 1; Wall Street Journal, November 8, 1967, p. 2, col. 3.

²⁸ Tanzer, *supra*, pp. 75, 76.

²⁹ Wall Street Journal, February 7, 1969, p. 21, col. 3.

³⁰ Wall Street Journal, March 25, 1969, p. 9, col. 1.

³¹ Wall Street Journal, June 26, 1970, p. 8, col. 3.

³² W. R. Grace Annual Report 1970, p. 56.

³³ Wall Street Journal, October 31, 1969, p. 5, col. 1.

million dollars. That payment, however, was to be made without interest over a period of 20 years and contingent upon Bolivia's ability to market the oil from the seized property at a profit.³⁴ Whether in fact Gulf Oil will ever receive anything from these properties remains to be seen, but it is worth noting that Gulf Oil called the settlement "fair and equitable under the circumstances".³⁵

In 1969 and 1970, the Algerian government nationalized the Algerian properties of a group of non-French oil companies: Standard Oil of New Jersey, Mobil, Phillips, Sinclair and Royal Dutch Shell. No data is available to us as to the compensation paid for this property, if any. In 1971 Algeria nationalized most of the French oil companies. On December 15, 1971, an agreement was signed, by the terms of which compensation of \$37 million was cancelled out by back taxes owed by the French oil company to Algeria. Algeria still claims \$80 million for other debts due to it, to be settled in the future. The result is that the owners of the property received nothing for the oil wells nationalized.³⁶

In Zambia the government entered into an agreement with foreign copper mining companies for the purchase by the government of 51% of the shares of the foreign companies. There was a sharp dispute of the actual value of the properties in question: the book value was \$170 million but the owner estimated the value of the properties at over \$750 million. In any event, Zambia agreed to pay \$90.2 million for the stock it purchased, again to be paid over a period of time.³⁷

In 1971 the Guyana government nationalized the bauxite properties of Alcan Ltd. Again there was a sharp dispute

³⁴ Wall Street Journal, September 11, 1970, p. 20, col. 3.

³⁵ Wall Street Journal, September 14, 1970, p. 13, col. 2.

³⁶ New York Times, December 16, 1971, p. 24, col. 3.

³⁷ Wall Street Journal, October 20, 1969, p. 15, col. 1; Fortune, Vol. 82, No. 2, August 1970, p. 190.

as to the value of the properties, various estimates ranged between \$130 million and \$85 million. The government agreed to pay \$53.5 million over a period of 20 years at 6% interest.³⁸

Finally, in July 1971, the Chilean government nationalized the copper mining properties of Anaconda and Kennecott. Anaconda has claimed that its property is worth at least \$1.2 billion. The Chilean government, on the other hand, estimates the book value of the property at \$415 million but it has imposed a retroactive excess profits tax which exceeds that book value by a substantial amount. It therefore has offered to pay nothing for the properties in question. The situation with respect to Kennecott is similar.³⁹

The preceding analysis has covered only major nationalizations for which data could be obtained relatively easily. Actually nationalization without "fair" compensation is an even more widespread phenomenon than the foregoing would indicate. A recent survey of 187 United States corporations which have experienced expropriations since the end of World War I (excluding Cuba) disclosed that the companies were involved in 103 separate acts of expropriation, of which 34 were in Communist countries and 69 in non-Communist countries. Most of the companies reported that they had received no compensation at all; of those who had received compensation, only about half felt that the compensation was adequate. In most cases the host government did not offer compensation at the

³⁸ 13 Executive (Canada), Vol. 13, No. 6 (June, 1971), pp. 34, 35; Wall Street Journal, July 15, 1971, p. 5. col. 1; New York Times, June 28, 1971, p. 47, col. 3.

³⁹ *Chile: Documents Concerning the Nationalization of the Copper Companies*, 10 Int. Legal Materials (November 1971), pp. 1235 through 1253; Wall Street Journal, December , 1971, p. , col. .

time of the expropriation and even when such compensation was offered promptly it was totally inadequate.⁴⁰

Finally, we may note that the U.S. State Department itself has proclaimed the virtual impossibility of determining fair compensation. In a letter to Senator J. W. Fulbright (May 7, 1962) the Assistant Secretary, Frederick G. Dutton wrote as follows:

In response to your request of May 1, 1962 for information concerning expropriation of foreign investments owned by U.S. nationals, enclosed is a list of major instances of such expropriation since World War II.

* * *

In most cases, the problem of evaluation of property taken is so complex that it is impossible to arrive at a definite figure which represents the inherent value of the property for purposes of comparison with the amount of compensation offered by the taking country.

* * *

The enclosed list indicates only whether settlements were made, but the Department of State considers that a settlement is concluded acceptable to both sides is more significant than the initial terms offered by the taking government.⁴¹

⁴⁰ Root: *The Expropriation Experience of American Companies: What Happened to Thirty-Eight Companies*, 11 Business Horizons, p. 69 (April 1968).

⁴¹ [1962] 1 U. S. Code, Congressional & Administrative News, p. 2078, 87 Cong., 2d Session.